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IN THE SUPREME COURT
of the
UNITED STATES

October Term, 1973

No. ____

In the Matter of
RANCHERO MOTOR INN, INC.,
Bankrupt

GALEY CONSTRUCTION CO., & ASPHALT PAVING CO.,
Petitioners

v.

UTAH MORTGAGE LOAN CORPORATION,
Respondent

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

Petitioners, Galey Construction Co., and Asphalt Paving Co., pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered January 23, 1974, affirming the Judgment of the District Court of the United States for the District of Idaho, which gave priority to the lien of the Respondent upon

real property over the liens of the Petitioners.

OPINIONS BELOW

The opinion of the Court of Appeals, dated January 23, 1974, (App. 1) is not reported.

An opinion of the District Court dated February 9, 1972, affirming the decision of the Referee in Bankruptcy, not reported (App. 2)

A Memorandum Decision of the Referee in Bankruptcy, dated June 25, 1971, giving priority to Respondents lien upon real property over that of the Petitioners (App. 3).

JURISDICTION

The Judgment of the Court of Appeals was entered on January 23, 1974. This Court has jurisdiction under 28 U.S.C.A., Section 1254 (1).

QUESTIONS PRESENTED

Whether the mechanics liens of the Petitioners encumbering real property of the bankrupt, Ranchero Motor Inn, Inc., were superior to the lien of the construction deed of trust owned by Respondent upon said real property, at least as to that portion of the deed of trust securing construction advances made after the mechanics liens had attached to the property.

STATUTORY PROVISIONS INVOLVED

Two statutes of the State of Idaho are indirectly involved:

45-501, Idaho Code, Right to lien. - Every person performing labor upon, or furnishing materials to be used in the construction, alteration or repair of any mining claim, building, wharf, bridge, ditch, dike, flume, tunnel, fence, machinery, railraod, wagon road, aqueduct to create hydraulic power, or any other structure or who grades, fills in, levels, surfaces or otherwise improves any land, or who performs labor in any mine or mining claim, and every professional engineer or license surveyor under contract who prepares or furnishes designs, plans, plats, maps, specifications, drawings, surveys, estimates of cost, on site observation or supervision, or who renders any other professional service whatsoever for which he is legally authorized to perform in connection with any land or building development or improvement, or to establish boundaries, has a lien upon the same for the work or labor done or professional services or materials furnished, whether done or furnished at the instance of the owner of the building or other improvement or his agent; and every contractor, subcontractor, architect, builder or any person having charge of any mining claim, or of the construction, alteration or repair, either in whole or in part, of any building or other improvement, as aforesaid, shall be held to be the agent of the owner for the purpose of this Chapter: provided, that the lessee or lessees of any mining claim shall not be considered as the agent or agents of the owner under the provisions of this Chapter.

45-506, Idaho Code. Liens preferred claims. The liens provided for in this chapter are preferred to any lien, mortgage or other encumbrance, which may have attached subsequent to the time when the building, improvement or structure was commenced, work done, or materials or professional services were commenced to be furnished; also to any lien, mortgage, or other encumbrance of which the lienholder had no notice, and which was unrecorded at the time the building, improvement or structure was commenced, work done, or materials or professional services were commenced to be furnished.

STATEMENT OF THE CASE

This matter originally came on for hearing before the Referee in Bankruptcy as a result of the Trustee in Bankruptcy's "Petition for Hearing to Determine Priority of Liens on Real Property and Personal Property" filed February 3, 1971 wherein the Trustee requested the Referee to determine the priorities of liens held by various secured creditors upon real property owned by the Bankrupt.

The particular dispute in question is between two classes of secured creditors of the bankrupt corporation as to the priorities of their respective liens encumbering the realty.

The Bankrupt is Ranchero Motor Inn, Inc., an Idaho Corporation (hereinafter "Ranchero") officially organized on November 13, 1968, for the purpose of constructing, owning and operating the Ranchero

Motor Inn truck stop and restaurant in Boise, Idaho.

All the stock in the corporation was and is owned by Garth G. Eckert.

The Respondent, Utah Mortgage Loan Corporation, is and has been for many years a corporation engaged in the business of mortgage lending in Idaho and elsewhere. The company is wholly owned by First Securities Corporation, which also owns the chain of First Security Banks operating throughout Idaho. Respondent loaned Ranchero $725,000.00 for the construction of the truck stop and restaurant, which loan was disbursed in monthly construction advances throughout the period of construction, and repayment of which was secured by a deed of trust encumbering the real property of Ranchero.

The Petitioner, Galey Construction Co. Inc., (hereinafter, "Galey") is an Idaho corporation engaged in business as a general contractor performing all phases of ordinary contracting work, and which company constructed the building comprising the truck stop and restaurant.

As a result of such construction, Galey acquired a mechanic's lien against the real property of Ranchero in the amount of $396,000.00.

Likewise, Petitioner, Asphalt Paving and Construction Co. Inc., (hereinafter "Asphalt") is a paving

contractor which improved and blacktopped certain portions of said real property, thereby acquiring a lien on the real property to the extent of approximately $50,000.00.

Respondent contends that its recorded deed of trust has first priority as to all funds advanced by it under Disbursement Schedule and Loan Agreement to the full amount of the deed of trust, even as to those construction advances made after the mechanic's liens of Petitioners and others had attached. With this contention, the Referee, District Court, and Court of Appeals agreed.

Petitioners, on the other hand , contend that the optional nature of the construction advances made by Respondent after the mechanic's liens had attached to the property, subordinated such advances to the mechanic's liens. The contention is founded upon the so-called Obligatory-Optional Rule hereinafter discussed.

By Memorandum Decision dated June 25, 1971, (App. 3), the Referee resolved the dispute between the secured creditors, holding Respondent deed of trust to be superior to the liens if Petitioners. The District Court and the Court of Appeals affirmed.

We seek review of the affirmance of the decisions of the Referee in Bankruptcy and the District Court, and a reversal, holding Petitioner's liens

to be superior to that of Respondent, at least as to all those construction advances made by Respondent to the bankrupt after the first $215,000.00.

REASONS FOR GRANTING THE WRIT

Most states apply the so-called "Obligatory-Optional" Rule in determining priorities between the lien of a first mortgagee who has made advances on a construction mortgage, some of which are made after a contractor's mechanic's lien has attached as an encumbrance on the land.

It is not questioned that Idaho, like other states, gives priority to the mortgage lender if all advancements are made pursuant to a recorded mortgage or deed of trust, and by virtue of contractual obligations under the mortgage or a collateral contract. On the other hand, if the lender is not contractually obligated to make the advancements, those advancements will be considered optional in nature, rather than obligatory, and if made after attachment of the contractor's lien (and constructive or actual notice thereof) the lien of those advancements will be subordinated to the mechanic's lien of the contractor.

The Idaho Supreme Court has rendered no decision on the rule as it applies to a modern, form lending agreement.

These printed form lending contracts are drafted

by skilled attorneys for most corporate lenders, and contain every conceivable provision for the benefit of the lenders, giving them the greatest latitude imaginable as to the manner, time, and fact of making the periodic construction advancements.

Although the Petitioner argued that the particular form contract contained so many reservations for the benefit of the lender as to render its duty to make the advancements optional, if not illusory, the Referee in Bankruptcy declined to consider the arguments.

Rather, he relied on one California Case, that of Smith v. Anglo California Trust Co. 205 Cal. 496, 271 Pac. 898 (1928), to support his conclusion that if a recorded mortgage shows on its face the ultimate amount of the advancements to be made, and a book account is opened in the records of a lender for that amount (non-interest bearing, except as to advancements already made), then all advancements will be deemed obligatory rather than optional.

Since there were no Idaho cases directly in point, he did not attempt to determine the rule in Idaho but rather decided the case on what he considered to be the "better rule".

The Federal District Court affirmed, with little additional comment, and without additional citations.

Petitioners contend that the Anglo California case decided by the California Appellate Court in 1928, supra, is not and has not been controlling even in that State on the point in question. As to application of the Obligatory-Optional Rule, there have been other more definitive California cases, that of Yost-Linn Lumber Co. v. Williams, 121 Cal. App. 571, 9 P.2d 324, decided by the California Appellate Court three (3) years later in 1932, and the case of Community Lumber Co. v. California Publishing Co., 215 Cal. 74, 10 P.2d 60, decided by the California Supreme Court, also in 1932.

More importantly, after the District Court's affirmance of the Referee in this case, and prior to the hearing before the Court of Appeals, the Supreme Court of Washington rendered a definitive and comprehensive decision on the Obligatory-Optional Rule, wherein it analyzed and evaluated the rule in light of the contemporary, form lending contract.

That case was National Bank of Washington v. Equity Investors, 81 Wash.2d 886, 605 P.2d 20 (1973), the facts of which were contemporary to those in this case. So far as this writer is aware, the Washington Supreme Court is the first Court in the nation to undertake an evaluation of such a form lending contract with respect to the illusory or optional provisions, affecting the obligations of the lender to

continue making periodic construction advancements. In effect, the Court recognized the respective contributions of money, labor and materials to the completion of any construction project, and held that the provisions of the contract gave the lender such great latitude in the manner and fact of making the advancements that they were, in law, only optional on the part of the lender.

The Washington Court dealt with the same issues, and the same precedents as did the lower courts in the instant case, and concluded that the same Obligatory-Optional Rule gave the contractor, mechanic's lien claimant priority over the optional advancements made by the lender after attachment of the mechanic's lien.

While it is recognized that a decision of the Washington Supreme Court is not binding upon either the Idaho Supreme Court or the Federal District Court in Idaho, it is contended that the Referee, District Court and Court of Appeals did not examine, apply or deal with, Idaho law as such, but rather applied a general rule of law erroneously.

In affirming the decision of the Federal District Court, the Court of Appeals apparently decided that the Bankruptcy Referee and the Federal District Judge were the experts on Idaho law, and affirmed the decision without additional comment. Since no

examination of Idaho law was involved in the decision, it is Petitioners' position that the Court of Appeals was applying general law erroneously and without apprising itself as to the merits of the action.

Petitioners seek reversal of the previous decisions in this case.

Respectfully submitted,

CLEMONS, COSHO, HUMPHREY & SAMUELSEN

By _____
Louis H. Cosho and
Howard Humphrey
Members of the Firm
1110 Bank of Idaho Building
Boise, Idaho 83702

Counsel for Petitioners

CERTIFICATE OF MAILING

I HEREBY CERTIFY That a true and correct copy of the foregoing PETITION FOR A WRIT OF CERTIORARI was mailed, by depositing a copy of same in the United States mail at Boise, Idaho, postage thereon prepaid, to the following attorney of record, this _____ day of April, 1974:

Moffatt, Thomas, Barrett & Blanton
P.O. Box 829
Boise, Idaho 83701

_____
Louis H. Cosho

APPENDIX #1

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

In the Matter of RANCHERO MOTOR INN, INC., Bankrupt	)	
GALEY CONSTRUCTION CO. & ASPHALT PAVING CO., Creditor-Appellants,	)	No. 72-1660
vs.	)	MEMORANDUM
UTAH MORTGAGE LOAN CORPORATION Creditor-Appellee	)	

On Appeal from the United States District Court for the District of Idaho

Before: MERRILL and BROWNING, Circuit Judges, and WEIGEL, District Judge*

This case involves a question of the priorities of creditors of an Idaho bankrupt. Utah Mortgage Loan Corporation provided construction money to the bankrupt in the sum of $725,000, taking a trust deed as security. Galey Construction Co. & Asphalt Paving Co. provided labor and materials in the course of construction and claim mechanics' liens upon the property covered by Utah's trust deed. Utah's payments were made in installments throughout the course of

* Honorable Stanley A. Weigel, United States District Judge for the Northern District of California, sitting by designation.

construction. The issue presented was stated by the District Court as follows:

> "All parties agree that the so-called optional payment rule is to be applied. They disagree as to the application. It is clear that in Idaho, with regard to construction loans to be advanced in installments, that if the amounts to be advanced are obligatory on the lender, intervening materialmen and labor claims in the form of mechanics' liens remain secondary to the original loan even though the installment advances are made after the mechanics' liens have attached. Contrariwise, if the payment of the advances by the lender is optional with the lender, the intervening liens have a prior position to later advances. In the instant case the amount of the loan was certain and the conditions for a schedule of installments were established. This, Utah says, made the loan an obligatory one and the security of the trust deed covered all the advances and remained superior to the intervening materialmen's liens."

The court's resolution of the dispute was as follows:

> "The Referee agreed with this position

of Utah and in his 'Memorandum Decision' correctly, in my view, expressed the controlling law:

> 'Although the lien claimants assert respectable authority which states that, if the advances are conditional upon the borrower's performing conditions precedent, they are optional advances, I am convinced that the better rule is that if the total sum to be advance is certain and the amount thereof can be ascertained at any time, it is an obligatory loan, even though the lender may withhold payment until certain conditions are met by the borrower.'"

We agree in this construction of Idaho law.

Judgment affirmed.

APPENDIX #2

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of	)	BK. No. 70-640
	)	
RANCHERO MOTOR INN, INC.,	)	ORDER AFFIRMING
Bankrupt	)	REFEREE IN BANK-
	)	RUPTCY
	)	

This matter is before the Court on a Petition for Review of a determination of priorities among creditors made by the Referee in Bankruptcy.

Briefs have been filed in this Court, oral argument afforded and the transcript of oral testimony with documentary evidence has been furnished to and examined by the Court. It was previously, orally, ordered that the taking of additional evidence was not required.

Ranchero Motor Inn, Inc. (hereinafter "Ranchero"), a single ownership Idaho corporation, was formed to purchase land and construct thereon a large truck stop operation along the newly located interstate highway at the outskirts of Boise, Idaho. To obtain construction money, the corporate owner approached the Utah Mortgage and Loan Corporation (hereinafter "Utah") and successfully negotiated a land purchase

and construction loan commitment in the amount of $725,000.00 calling for installment advances. As security for the loan Ranchero gave a deed of trust covering the full amount of the loan commitment, which deed of trust was duly recorded. The real property described in the deed of trust, on which the construction of the truck stop facility was contemplated, constituted something in the excess of 21 acres of land. The Idaho statutes authorizing the trust deed scheme of real estate security appears to limit the use of the trust deed device to tracts of land not exceeding 20 acres in area.

Construction commenced as planned and various materialmen, the moving parties herein, furnished material and labor. They were not paid in full. Ranchero had insufficient funds and was unable to secure additional financing, all of which led to this bankruptcy.

Utah made claim as a secured creditor for the full amount of its loan, relying on the lien of the deed of trust. The materialmen, having filed statutory liens, sought to be placed in the superior position to that of Utah. The thrust of the materialmen's claim is twofold: firstly, that the deed of trust was ineffective as the area of the tract of land involved exceeded the apparent statutory limitation of 20 acres; and, secondly, that the ad-

vancement of loan installments by Utah was at Utah's option thereby depriving Utah of the alleged security position on such installments advanced after the materialmen furnished material or labor.

An evidentiary hearing was conducted by the Referee who subsequently filed a "Memorandum Decision" and detailed Findings of Fact and Conclusions of Law favorable to Utah. This Petition for Review followed:

I reviewed the evidence and examined the Findings of Fact made by the Referee. Such of the facts so found as are required to dispose of the issues raised by this Review are supported by the record and are not clearly erroneous.

As indicated by the Referee in his decision, the Idaho law governing the use of trust deeds, as it was worded at the times here relevant, was ambiguous. While the statute appeared to intend to limit the trust deed to acreages of 20 acres or less, the statute, as the Referee held, does not make void such an instrument if indeed a larger tract is included. The Referee concluded that the trust deed was properly executed, eligible for recordation, and that upon such recordation gave the requisite notice of the lien. I am persuaded that this is a correct application of the law.

All parties agree that the so-called obligatory-optional payment rule is to be applied. They disagree

as to the application. It is clear that in Idaho, with regard to construction loans to be advanced in installments, that if the amounts to be advanced are obligatory on the lender, intervening materialmen and labor claims in the form of mechanics' liens remain secondary to the original loan even though the installment advances are made after the mechanics' liens have attached. Contrarywise, if the payment of the advances by the lender is optional with the lender, the intervening liens have a prior position to later advances. In the instant case the amount of the loan was certain and the conditions for a schedule of installments were established. This, Utah says, made the loan an obligatory one and the security of the trust deed covered all the advances and remained superior to the intervening materialmen's liens.

The Referee agreed with this position of Utah and in his "Memorandum Decision" correctly, in my view, expressed the controlling law:

> "Although the lien claimants assert respectable authority which states that, if the advances are conditional upon the borrowers performing conditions precedent, they are optional advances, I am convinced that the better rule is that if the total sum to be advanced is certain and the amount thereof can be ascertain (sic) at any time, it is an obligatory loan, even though the lender may withhold payment until certain conditions are met by the

borrower. The fact that the borrower does not meet the conditions, or delays in doing so, does not lessen the lender's obligation to make the loan, when he does. Third parties have no right to assume that the conditions will not be met, or that they may not be waived by the party who is entitled to their performance. It would cut across established contract law to say that a right to performance of a condition could not be waived by a contracting party. Smith vs. Anglo California Trust Co., 271 Pac. 890, states that the test is whether the amount payable is capable of definite ascertainment at all times. The documents in this case meet that test.in my opinion. Further, I am of the opinion that merely because the lender retains certain options as to how the funds loaned shall be applied, such as to taxes and insurance, if it deems it advisable to do so to protect its security, does not destroy the obligatory nature of the agreement. In the case at bar the lender did in fact advance the entire sum."

Since I find that the dispositive Findings of the Referee are not clearly erroneous and that the law applied thereto is correct, it follows that the order herein sought to be reviewed must be affirmed.

IT IS SO ORDERED.

Ray McNichols
United States District Judge

APPENDIX #3

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF IDAHO

In the Matter of RANCHERO MOTOR INN, INC., Bankrupt	)))	No. BK 70-640 MEMORANDUM DECISION

This matter is before the Bankruptcy Court upon trustee's motion to determine the priorities of liens upon real and personal property of the bankrupt heretofore sold by the trustee with the consent of all lien creditors; it being understood at the time of the sale that the liens as determined would apply to the proceeds. Two sets of liens are involved. Those applying to the real property, which was sold for a gross figure of $735,000.00, and which involves a conflict between the Utah Mortgage Loan Corporation, who is the beneficiary under a trust deed recorded in Ada County on April 30, 1969, and which secures a loan of $725,000.00 to the bankrupt and various lien creditors who are unpaid for construction work on the project. The other liens apply to chattels sold by the trustee for the gross amount of $80,000.00.

Pursuant to an order to show cause issued by the Referee, lien creditors filed a statement of their claimed liens.

The validity of the liens against the personal property were resolved at a pretrial conference held on March 12, 1971. At that time the security interest of Gem Equipment and Sales Service was conceded by the trustee. The attachment lien of IFECO has been held void under Section 69a of the Act.

At the pretrial conference the validity of most of the mechanics' liens filed in the months of January and February of 1970, and one in May of 1970 was not disputed.

The real conflict is between the lien creditors as a group and the Utah Mortgage Loan Corporation as beneficiary of the trust deed. The proceeds of the sale of the real property is much less than the combined lien claims. The lien creditors attack the trust deed of which Utah Mortgage Loan Corporation is beneficiary on four primary grounds. These are, first, that because the trust deed admittedly covers more than twenty acres of ground in apparent violation of Section 45-1502 (5), I.C., such trust deed was not entitled to recording, is a void instrument and thus does not impart constructive notice to the parties who acquired liens upon the same property thereafter. Second, that even if the trust deed be a valid instrument and imparts notice to subsequent lien holders, the obligation of Utah Mortgage Loan Corporation to advance money was optional. They are

allegedly optional because of failures of performance by the bankrupt, which were conditions precedent to advances, and that this being the case, advances made after the lien claimants started work on the project, with the knowledge of Utah Mortgage Loan Corporation, are subordinate to the mechanics' liens of contestants. Thirdly, the lien claimants allege that they have an equitable lien against any funds that were undisbursed by Utah Mortgage Loan Corporation at the time they performed work, or at least they have an equitable claim against any funds that were used for purposes other than direct construction costs. Further, that Utah Mortgage Loan Corporation was negligent in supervising the distribution of loan funds.

I find the facts which are necessary to a decision of that matter to be as follows: One Garth Eckert, in November of 1968, formed the bankrupt corporation. He was the sole stockholder. Thereafter, he obtained an option to buy land in Ada County upon which the project in question was eventually constructed. Thereafter, with the assistance of some real estate promoters Eckert was able to get a commitment from the Texaco Company that it would lease a truck stop facility constructed on the location if it met its plans and specifications. This was to be a twenty year lease at a rental sufficient to amortize a large investment in facilities. Bankrupt, through Eckert, then consulted an architectural firm, obtained prelim-

inary plans and specifications for a facility sufficient to satisfy the requirements of Texaco. Thereafter, Utah Mortgage Loan Corporation was approached for a construction loan, which was later granted. The terms of the loan are contained in Exhibits 6 (commitment letter, 7 (Disbursement Schedule, Building Loan Agreement and Assignment of Accounts), 11 (trust note), 12 (trust deed, and 13 (Closing Instructions to Security Title Company). Garth Eckert became the contractor for bankrupt and through an entity known as Eckert Ranches, the exact nature of which is in doubt, did most of the site preparation work. Other contractors were thereafter engaged by him in the name of the bankrupt. These contractors are now the mechanic lien claimants. The largest, and the contractor who was in effect the prime contractor after Eckert Ranches ceased to work was Galey Construction Co. The documents between Utah Mortgage Loan Corporation and bankrupt were all executed at the end of April, 1969, and the trust deed was recorded on April 30, 1969. The rest of the work by other lien claimants was done in the latter part of August and in September and October of 1969.

Utah Mortgage Loan Corporation disbursed the funds in the loan account, upon the request of the bankrupt. Exhibit 20 is a summary of disbursements. Immediately after execution of the documents Utah Mortgage Loan Corporation caused $176,000.00 to be

disbursed, at the bankrupt's request for the purchase of the land upon which the project was to be constructed and to clear title thereto. Of this amount $29,000.00 was expended as loan and commitment fees. All this money was disbursed before any contractor started to work. Also, on May 1, 1969, a second disbursement was made to Eckert Ranches for items, not for construction, except the sum of $6,572.50. Thereafter, various other advances were made as shown on Exhbit 20, part of which went to pay contractors, but a large part also went to pay Utah Mortgage Loan Corporation's interest on its loan and other matters not directly related to construction cost. All funds available for construction costs were as practical matter gone by October 7, 1969.

The present lien claimants did not file their liens until after all of the funds were disbursed and the record is devoid of any indication that they gave notice to Utah Mortgage Loan Corporation that they were not being paid. Not one asked Utah Mortgage Loan Corporation about the status of the fund at any time. Before starting work they made only the most casual inquiries about the construction loan, although it was common knowledge that Utah Mortgage Loan Corporation had granted a construction loan of $725,000.00. Mr. Galey, President of Galey Construction Co., stated that he was induced to con-

tinue work when he was not receiving payment because of the representations of Garth Ecker and his agents that the bankrupt would be getting additional financing from some source other than Utah Mortgage Loan Corporation; that Sheraton Hotels Company had committed itself to build a large motel upon the premises and that he could be assured of the contract. As late as January 23, 1970, he released any claim to funds remaining in the Utah Mortgage Loan account (see Exhibit 26).

It is clear that the agents of Utah Mortgage Loan Corporation knew that the various lien claimants were performing work upon the property, as a result of their visual examination and inspection of the property. It is also obvious that, because they knew to whom the funds were being disbursed, that they knew the present claimants could not be paid in full out of their loan.

I conclude that although the lien claimants knew the construction loan existed, and felt comfortable because it existed, they did not in any way make investigation of its terms, or make any demands for payment from it. They cannot be said to have relied upon it for payment. Instead, they relied upon the credit of the bankrupt and Garth Eckert; they were negligent in protecting their own interests. There is nothing in the record to show that Utah Mortgage Loan Corporation made any representations to the

lien creditors that the funds would be disbursed for their benefit, nor did they make any false or misleading representations to any contractor.

Both sides to this controversy have filed very excellent and exhaustive briefs, covering all of the discoverable law on the issues. I, therefore, will not attempt to support my conclusions with any particular citations of authority.

My legal conclusions, and a brief statement of the reasons for so reaching them, are as follows:

1. That the trust deed of Utah Mortgage Loan Corporation is a valid instrument entitled to be recorded under the laws of Idaho, and as such gave constructive notices to the lien creditors of its contents. My basic reason for so holding is that Section 45-1502(5), I.C., is so ambiguous that it must be read literally. It says that where the trust deed "states that the real property involved is within either of the above provisions, such statement shall be binding upon all parties and conclusive as to compliance with this act relative to the power to make such transfer and trust and power of sale conferred in the act". The deed in question stated that the property did not exceed 3 acres in size, thus the terms of 45-1502(5), I.C., are met. I am sure that the legislature may have intended to restrict the use of trust deeds to urban transactions and acreages

under 20 acres, but they did not do so. The legislature did not say a deed for an acreage in excess of that amount would be void, or not eligible for recordation, or not effective for any purpose. The deed in question was properly acknowledged and met all the requirements of the recording statutes. As such, I conclude it was constructive notice of its contents.

2. Both parties agree that the rule with regard to construction loans payable in installments, is that if the amounts to be paid are obligatory upon the lender, intervening mechanics' liens are secondary to the original loan, even though some advances are made after liens have attached. If the installments are optional, intervening liens have priority over later advances. Applying this rule to the instruments in the present case, I conclude that the advances made in this case were obligatory.

Although the lien claimants assert respectable authority which states that, if the advances are conditional upon the borrowers performing conditions precedent, they are optional advances. I am convinced that the better rule is that if the total sum to be advanced is certain and the amount thereof can be ascertain at any time, it is an obligatory loan, even though the lender may withhold payment until certain conditions are met by the borrower. The

fact that the borrower does not meet the conditions, or delays in doing so, does not lessen the lender's obligation to make the loan, when he does. Third parties have no right to assume that the conditions will not be met, or that they may not be waived by the party who is entitled to their performance. It would cut across established contract law to say that a right to performance of a condition could not be waived by a contracting party. Smith vs. Anglo California Trust Co., 271 Pac. 890, states that the test is whether the amount payable is capable of definite ascertainment at all times. The documents in this case meet that test in my opinion. Further, I am of the opinion that merely because the lender retains certain options as to how the funds loaned shall be applied, such as to taxes and insurance, if it deems it advisable to do so to protect its security, does not destroy the obligatory nature of the agreement. In the case at bar the lender did in fact advance the entire sum.

3. Even if the advances should be considered optional, I conclude that the lien claimants did not give notice of their liens in the sense required by the best reasoned case law in this type of a situation. If the rule is as advanced by lien claimants, no lender could safely advance funds under a construction loan unless he ascertained that all contractors had been paid in full before he made his

next advance. In states such as Idaho, there is no way mechanically for them to do this, except to examine the actual records of lien filings. The record shows Utah Mortgage Loan Corporation, through its disbursing agent, did check the records for actual liens. Where there is no contractual relationship between the lender and the borrower's building contractor, I fail to see why the burden should be upon the lender to protect the contractor. The burden of giving notice, checking the status of disbursement, checking the financial responsibility of the owner, should be upon the contractor under lien laws of the type we have in Idaho. It appears to me that the lien claimants want to be treated as third party beneficiaries of a contract between the borrower and lender, but in fact, they were not because the contract is made expressly for the borrower's benefit, not for the construction contractor. See Section 29-201, I.C.

5. Lien claimants urge that they are entitled to an equitable lien upon undisbursed funds. I understand that in this case they mean funds that were disbursed by Utah Mortgage Loan Corporation for items not directly related to construction primarily interest payments paid to themselves which depleted the last funds in the loan account. They cite two California cases, McBain vs. Santa Clara

Savings and Loan Assoc., 241 Ca. App. 2d 829, 51 Cal. Reporter 78; and Miller vs. Mt. View Savings and Loan Assoc., 48 Cal. Rpt 278. In those cases the lien claimants had filed notice of their lien before all funds were disbursed and there was in fact funds in the hands of the lender at that time. This is not really the case here. The theory upon which the California Court of Appeals justified the holding is difficult to determine. See 40 So. Cal. L.R. 439. It would appear to be some sort of equitable estoppel, but the legal and philosophical difficulty is that it is very difficult to find reliance by the contractors, in the absence of any misrepresentation by the lender.

In the case at bar this theory and the negligence theory would have a great deal more validity if the lien contractors had not been so negligent in caring for their own interests. Had they made any direct inquiry of the bankrupt or Utah Mortgage Loan Corporation of the status of funds at the time they commenced work, or had they received any misrepresentation from Utah Mortgage Loan Corporation, or had they been refused information about the status of the loan, I would feel that they might have some equitable standing. The fact their effort, money and labor contributed to the value of the security of Utah Mortgage Loan Corporation, entitles them to sympathy, but they made such contribution voluntarily

and apparently with blind faith in the bankrupt. I can see no equitable or public policy ground for requiring Utah Mortgage Loan Corporation to give up its security rights in the absence of some obligation to claimants.

I, therefore, must conclude that Utah Mortgage Loan Corporation has a valid trust deed which is superior to and prior to any of the lien claims, and that it is entitled to offset the sums due it on said obligation as of the date of bankruptcy against the purchase price of the realty, less reasonable administrative costs and costs incurred by the trustee in maintaining and conserving the property until it could be sold as a business with going concern value. What these costs are will have to be determined upon hearing and evidence produced before the Referee.

Counsel for Utah Mortgage Loan Corporation is asked to prepare formal findings of fact, conclusions of law and order for my signature.

DATED at Boise, in said District, June 25, 1971.

MERLIN S. YOUNG
Referee in Bankruptcy